IN THE HIGH COURT OF BOMBAY AT GOA.

WRIT PETITION NO. 174 OF 2000.

Shri C.M.A. Khadar,
PWD Contractor,
r/o A-3, Surendra Bldg.,
Khadpaband, Ponda, Goa. ... Petitioner.

Versus

1. Government of Goa
   through the Secretary,
   Industries & Mines,
   Secretariat, Panaji.
2. Executive Engineer,
   W.D. VI, Irrigation
   Dept., Government of
   Goa, Tillari Irrigation
   Project, Irrigation
   Dept. Complex, Near
   Tivim Industrial Estate,
   Tivim, Goa.
3. Union of India through
   the Secretary, Ministry
   of Industries & Mines,
   Udyog Bhavan, New Delhi. ... Respondents.

Mr. S.G. Dessai, Senior Advocate with Mr. Shivan Dessai, Advocate for the Petitioner.

Mr. A.N.S. Nadkarni, Advocate General with Mr. H.R. Bharne, Government Advocate for the Respondents 1 and 2.

Mr. V.P. Thali, Senior Central Government Standing Counsel for the Respondent No. 3.

Coram : N.N. MHATRE AND P.V. HARDAS, JJ.

Date of reserving the Judgment : 21.01.2004.

Date of pronouncing the Judgment:12.03.2004.

J U D G M E N T (PER HARDAS, J.)

This petition under Article 226 of the Constitution prays for issuance of an appropriate writ, order or direction declaring that the levy of royalty used by the petitioner for carrying out the work, that is, Item No. VI, of the Sanquelim Canal Work is ultra

vires the Mines and Minerals (Regulation and Development) Act, 1957, and/or the Goa, Daman and Diu Minor Mineral Concession Rules, 1985 or the Goa Minor Minerals Concession (Amendment) Rules, 1993. The petitioner further prays that Item No. VI of the Schedule to the Goa, Daman and Diu Minor Mineral Concession Rules, 1985 and/or the Goa Minor Minerals Concession (Amendment) Rules, 1993 is ultra vires the Constitution. The petitioner also prays for directing the respondents 1 and 2 to refund an amount of Rs. 5,91,954.22 recovered from him as royalty.

2. The facts, as are necessary for the decision of this petition, are as stated hereunder:-

The petitioner is a Civil Contractor, registered as Class 1A contractor with the respondent/State. By virtue of his registration, the petitioner is entitled to undertake civil contracts of unlimited value. The petitioner is also registered as Class 1A contractor with the Governments of Karnataka and Maharashtra and, as such, has been in the business of Civil Contractor for the last 30 years. The respondent/State awarded tender of the work of construction of Sanquelim Branch Canal of Left Bank Main Canal of Tillari Irrigation Project from Channel 6045 metres to 6890 metres including the high level aqueduct

between Channel 6380 metres to 6490 metres and its transition at Village Latambarcem of Bicholim Taluka to the petitioner vide Work Order, dated 18th June 1996. The contract was for Rs. 4,43,93,336/-. An Agreement in that respect was executed between the petitioner and the respondent no. 2 representing the Governor of Goa, on 18th June 1996. The work was completed by the petitioner on 9th January 1999.

3. The Agreement, dated 18th June 1996, contained various conditions, the relevant conditions for the decision of this petition are reproduced as under:-

> "The Royalty on Minor Mineral's like Basalt, River, Sand (River Sand), Bricks, Earth (Brick Earth), etc., consumed on contract work will be recovered by the Department from the running bills of the Contractor, at rates stipulated in the Notification No. 5/42/83-ILD dated 2.7.1986 published in Official Gazette, Series I, No. 31 dated 28.10.1993 or as amended from time to time.
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> In the event of the Contractor claiming payment of royalty, he will have to produce satisfactory documentary evidence to the said effect for counter checking with the Directorate of Industries & Mines (As per circular No. 85/1/85-SSW-PWD/3 dated 19.4.85.
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> Revised para 5. The Contractor shall deposit royalty and obtain necessary permit for supply of Red Basalt, Stone Kunkar, and other Minor Minerals like laterite, basalt, river sand, brink, earth (brick earth), etc., from local authorities and shall communicate to the Director of Industries and Mines,

> Government of Goa, the particulars of the suppliers of the above Minor Minerals from time to time in the course of the execution of the works. Copy of the said communication shall be endorsed to the Division and Sub-Division concerned in any case before the preparation of the final bill".

The Agreement also contained a Schedule giving the rates of royalty as against the Minor Minerals. The Schedule to the said Agreement gives the item-wise description of the item of work, which was required to be executed by the petitioner. Item No. VI of the Schedule reads as under:-

> "VI. Earthwork in embankment with approved material from borrow pits (Contractor earth) including all lifts and loads laying in layers not exceeding 250mm thickness, controlled method of compaction using power roller or any other types of compacting machinery as approved by the Engineer-in-charge to the required dry density at requisite moisture content etc., complete."

4. The petitioner has stated that the Sanquelim Canal Work involved earth work in excavation in all types of strata, rubble packing with hard laterite stone under floors including watering, ramming and consolidating, etc., preparation of seat for Canal embankment, compacting of embankment with the available excavated material, dry stone pitching, earth work in embankment using contractor's earth, providing and laying cement concrete, centering and shuttering, filling available excavated earth, R.C.C. work etc..

The work under Item VI essentially involved the work of filling soil depressions with ordinary earth, brought from borrow pits arranged by the Contractor in order to make embankments for preparing the Canal Section. The petitioner had, thus, carried out the earth filling work of 2,95,977.11 cubic metres amounting to Rs. 2,92,82,042.71. From the running bills of the petitioner the respondent no. 2 has deducted royalty amounting to Rs. 5,91,954.22. After the work was completed on 11th January 1999, the respondent no. 2 prepared a pre-final and 16th bill on 12th January 1999. The petitioner had signed the final measurements under protest on 20th October 1999 before signing the final bill prepared by the respondent no. 2. According to the petitioner, the deduction of the amount as recovery of royalty is wholly illegal.

5. The respondent no. 2 in his affidavit has stated that Item VI of the Schedule, which forms part of the contract, comprises of "earth work in embankment with approved material from the borrow pits (Contractor's earth) including all lifts and leads etc.". It is further stated that the additional condition to the tender document which forms part of the contract authorises the Department to recover royalty on minor mineral from the running bills of the Contractor. The affidavit further states that in the event the

Contractor claims payment of royalty, the Contractor should produce satisfactory documentary evidence. It is further submitted that the estimate was prepared for the work including Item VI, taking into consideration the royalty charges to be paid by the Contractor and the petitioner by submitting the tender offer and signing the Agreement had accepted all the terms and conditions of the tender documents forming part of the contract, and while quoting the amount has taken into consideration that it was obligatory for him to pay the amount of royalty charges. It is further stated that there are specifications of M.O.S.T., C.P.W.D., as regards construction of the embankment, which is a technical aspect and that the execution of the embankment is to be done following the specifications as laid down, as otherwise if the proper compaction and density is not achieved, the embankment is washed away. The earth which is used for construction of the embankment has to be suitable for the construction and constitutes minor mineral. It is also stated that the earth used for the purpose of construction of embankment was not loose or ordinary earth. In the affidavit it is further stated that the Department was only an agency to recover the amount as per the additional conditions and if the petitioner produced satisfactory documentary evidence for counter checking with the Director of Industries and Mines, the petitioner would be entitled

to claim refund of royalty. It is further stated that the royalty charges have been recovered for and on behalf of the Director of Industries and Mines and if the petitioner produced satisfactory documentary evidence, he can get refund of the royalty amount recovered by the Department. Further it is stated that the petitioner had not protested when the amounts were recovered from the various running bills and it was only after completion of the work that the petitioner was making a claim for refund of the amount recovered as royalty. In paragraph 4 of the affidavit it is denied that Item VI essentially involved the filling of soil depression with ordinary earth brought from the borrow pits arranged by the Contractor in order to make embankment for preparing the canal section. It is denied that the petitioner had used ordinary earth as the earth is required to be brought from approved borrow pits. Paragraph 5 of the affidavit deals with the policy decision of the Government to check the repayment of royalty by recovering the same from the running bills of the Contractors. Further it is submitted in paragraph 7 that under Schedule I of the Rules framed by the Government of Goa under Section 15 of the Mines and Minerals (Regulation and Development) Act, 1957 under Item (iii) boulders, sand, gravel, all used for construction purpose either by excavation or collection has been notified as minor minerals. By Notification,

dated 18th November 1994, in Item VI for the word 'matti' words 'morrum, mattie' has been substituted. It is, thus, stated that for the construction of embankment, 'matti, morrum' is required to be used. In paragraph 8 it is denied that the petitioner had used only ordinary earth in the construction of the embankment.

6. In this petition, therefore, it is contended on behalf of the petitioner that the petitioner has used ordinary earth in the construction of the embankment and ordinary earth is not a minor mineral and, therefore, the recovery of royalty from the petitioner was wholly illegal.

7. We have heard Mr. Dessai, learned senior counsel for the petitioner, Mr. Nadkarni, learned Advocate General for the respondents 1 and 2 and Mr. Thali, learned senior Central Government Standing Counsel for the respondent no. 3.

8. This petition raises disputed questions, which cannot be gone into by this Court in its writ jurisdiction. The respondent no. 2 in his affidavit has clearly denied that the petitioner has used ordinary earth in the construction of the embankment. It is stated in the affidavit on behalf of the respondent no.

2 that the petitioner has also used matti and morrum which are minor minerals as per the Rules framed by the State of Goa. It is not possible for this Court to examine and opine whether the petitioner had used only ordinary earth in the construction of the embankment. The respondent no. 2 in his affidavit has stated that it is open for the petitioner to produce the necessary documents for claiming refund of the royalty charges which have been recovered from the running bills. According to us, it would be appropriate if the petitioner approaches the respondents and produces material to the satisfaction of the respondents that the petitioner had used only ordinary earth and had not used any other earth or morrum so as to attract the recovery of royalty charges. It is not possible for this Court in its exercise of writ jurisdiction to decide this disputed question of fact.

9. We, thus, see no merit in the petition and the same is dismissed giving liberty to the petitioner to submit the necessary documents and proof for claiming refund of the royalty, if the petitioner so chooses. Rule discharged with no order as to costs.

(NISHITA MHATRE)
JUDGE.

(P.V. HARDAS)
JUDGE.

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